NO. 48442-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LINDA K. HARPER,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant minimal due process when it terminated her from drug court without notice and an opportunity to be heard on alleged violations of her contract.

2. Under the appearance of fairness doctrine this court should remand for a new hearing on the defendant's motion for reconsideration before a different judge because a reasonably prudent, disinterested observer would not conclude that the defendant had obtained a fair, impartial and neutral hearing on her motion.

3. The trial court erred when it imposed legal-financial obligations the legislature has not authorized.

4. This court should not impose costs on appeal if the state substantially prevails.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant minimal due process if it terminates that defendant from drug court without notice and an opportunity to be heard on alleged violations of the drug court contract?

2. Under the appearance of fairness doctrine should an appellate court remand a case for a new hearing before a different judge when a reasonably prudent, disinterested observer would not conclude that the defendant had obtained a fair, impartial and neutral hearing under the original judge?

3. Does a trial court err if it imposes legal-financial obligations the legislature has not authorized?

4. Should the court of appeals impose costs on appeal if the state substantially prevails in circumstances in which the defendant has no current or future ability to pay?

STATEMENT OF THE CASE

By information filed June 23, 2015, the Thurston county prosecutor charged the defendant Linda K. Harper with five counts of identity theft and five counts of forgery. CP 3-4. The court thereafter appointed counsel of the defendant upon its finding that she was indigent. CP 5. On November 3, 2015, the defendant entered into a drug court contract with the Thurston County Prosecutor in this case whereby she agreed to attend drug court, successfully complete treatment, and give up her right to trial and the right to the presentation of evidence should she be revoked from the agreement. CP 12-15. She also agreed to a number of other requirements, including the following:

> 12. To make weekly payments to the Drug Court Program in the amount of $30.00 towards the cost of treatment.

CP 13.

In return, the Thurston County Prosecutor agree to dismiss the charges upon the defendant's graduation from the program. *Id.*

Following her entry into the program, the defendant was twice sanctioned for violations. CP 16, 22; RP 11/10/15 7-9, RP 11/17/15 11-14. The second sanction included seven days of jail. *Id.* On November 24, 2015, the defendant appeared in court for her weekly review, having just been released upon her second sanction. RP 11/24/15 11. Seven days later on

December 1, 2015, the prosecutor filed a "Petition Alleging Non-Compliance with Conditions of Drug Court Contract and Motion for Termination." CP 26. The Petition and Motion stated the following:

> COMES NOW JON TUNHEIM, Prosecuting Attorney in the and for Thurston County, State of Washington, by and through Joseph F. Wheeler, Deputy Prosecuting Attorney, and moves this Court for a petition alleging non-compliance with the Drug/DUI Court Contract, based upon the fact in the following declaration which allege that the defendant has violated the conditions(s) of the Drug/DUI Court Contract entered under the above-entitled cause, resulting in the State moving for the defendant's termination from the Drug/DUI Court.

CP 26.

The "following declaration" referred to in the Petition and Motion appeared at the bottom of the page under Mr. Wheeler's signature and stated as follows in its entirety.

> I, Joseph F. Wheeler, hereby certify that I am a Deputy Prosecuting Attorney for Thurston County, Washington. The non-compliance petition and motion for termination should be issued supported by the flowing [sic] fact and circumstances: failure to follow all terms and conditions of drug court.

CP 26.

On December 8, 2015, the defendant appeared on this petition. RP 12/8/15.1-3. At that time neither the court nor the prosecutor informed the defendant what constituted her alleged violations since her release from custody. *Id.* When asked what she had to say the defendant denied any willful violations of her drug court contract since she was last released from

custody on November 24th. RP 12/8/15 4-5. Specifically, the defendant argued as follows:

> THE DEFENDANT: Uhm, last week I came in with a attitude of me being right because I was helping someone and that is why I was late and then the parking lot issue which would most – the people that stand around could have said. I am serious about this program. I have dedicated I think quite a bit of my time into it even though it didn't show as far as being participating in and be in classes and making it to the other class on time due to other reasons as far as my health. I ended up in the emergency room while I was in custody because of the overwhelming amount of stress that's going on in the jail and I don't want to be a part of what's going on in there. So I am in orange due to the fact that I didn't want to be a part of what's going on there. I do want to continue to do drug court because I think it is going to be beneficial for me. I was still in the learning process of everything and I do and am going to be making mistakes here and there, but as far as my sobriety goes that was the toughest. And I did my seven day sanction on my dirty UAs and I still have a strong mindset about wanting to change my life and doing the right thing and showing the courts and the program that I can do this, and I am going to be able to be successful at doing it if I'm given the opportunity to do so.

RP 12/8/15 4-5.

Following the defendant's statement the court terminated her from the drug court program, apparently based upon the violations for which the court had already imposed sanctions. RP 5-6. The following gives the court's statement upon termination:

> THE COURT: Okay. Thank you.
>
> Well, I'm pausing because the Court was guardedly optimistic that Ms. Harper's allocution was going to be a little bit different than it actually was. And I know this is all about State of Washington versus Linda Harper but I can't help but recognize that, once again, Mr. Griffith is in a very difficult situation where I'm sure that his – I

am confident that Mr. Griffith's recommendation to his client, Ms. Harper, was that Ms. Harper say something other than what she said here this morning, so this is truly an unfortunate situation.

And, Ms. Harper, when you were before the Court last in front of me I took some time to explain to you and place on the record the long list of sanctions that this Court has imposed since you've been in the program, and I mean no disrespect to you, but when you say that you are serious about the program, your actions have not shown that you're serious about the program. In fact, you might -- and I don't appear -- I don't want to be flippant about it, but I think you may have set a record for the most number of sanctions in the very briefest period of time since you've been in the program so this is an easy call for the Court.

The Court will terminate Ms. Harper from the program, schedule this matter for a reading of the record next Tuesday at ten o'clock. See you Tuesday.

Looks like Ms. Harper is looking at a time long time, too, 43 to 57.

RP 12/8/15 6-7.

One week after this hearing the defense orally moved for reconsideration of the decision to terminate, and the defendant wrote a letter to the court in support of that motion. RP 12/15/15 7-10. Although the judge agreed to put the motion over for two weeks, he refused to let the defendant speak. RP 12/15/15 9. The judge then took the defendant's letter and ripped it up[1] while he stated the following to the defendant:

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[1]The verbatim report of the 12/15/15 hearing does not include a notation that the court took the defendant's letter and tore it up. However, at the next hearing the judge admitted that he had taken this action. Specifically, the court stated: "And I think what happened is, as I recall

MR. WHEELER: Your Honor, is the Court interested in hearing from Ms. Harper?

THE COURT: No.

Ms. Harper, here's the letter that you sent to me. I haven't read it. Don't write to me anymore. I'm not interested in hearing from you. You have zero credibility with me. Zero.

If you guys want to continue it two weeks, that's fine. I have a pretty good idea of what's going to happen.

RP 12/15/15 9-10.

Two weeks later the parties appeared before in this case, during which time the judge apologized to the defendant for his conduct at the prior hearing. RP 12/29/15 9-10. The court then denied the defendant's motion for reconsideration, reviewed the police reports, found the defendant guilty, and sentenced the defendant within the standard range to 43 months in prison. RP 12/19/15 16-21; CP 57-67. The court also imposed a $30.00 legal financial obligation, noting "Drug Court Balance" by it. CP 60.

Following imposition of sentence the defendant filed timely notice of appeal. CP 90. The court then entered a new Order of Indigency again finding that she did not have the means to hire her own attorney or pay for the costs of an appeal. CP 87-88.

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anyway, I remember you writing a letter to me that I tore up in front of you and told you not to write to me anymore." RP 12/29/15 15.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT MINIMAL DUE PROCESS WHEN IT TERMINATED HER FROM DRUG COURT WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD ON ALLEGED VIOLATIONS OF HER CONTRACT.

At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

> We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)). In *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000), the Court of Appeals states this principle as follows:

> The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Washington Constitution contains an almost identical clause. Wash. Const., art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."). At minimum, procedural due process requires notice and an opportunity to be heard. *Rivett v. City of Tacoma*, 123

> Wn.2d 573, 583, 870 P.2d 299 (1994). "'Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures.'" For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property.

Silver Firs Town Homes, Inc., at 1029.

In the case at bar the state and the prosecutor denied the defendant both notice and an opportunity to be heard. First, the state did not given any information to the defendant on what violations the state was claiming justified terminating her from the drug court program. The sum total of the notice provided was found in the unsigned and unsworn affirmation that was printed at the bottom of the state's motion. It states:

> I, Joseph F. Wheeler, hereby certify that I am a Depury Prosecuting Attorney for Thurston County, Washington. The non-compliance petition and motion for termination shoujld be issued supported by the flowing [sic] fact and circumstances: failure to follow all terms and conditions of drug court.

CP 26.

This statement does not put the defendant on any notice of the claims the state was making. It does not make any factual allegations and it does not cite to any provision of the drug court agreement the state claimed the defendant had violated. There certainly was no question that the defendant previously violated provisions of her drug court agreement. However, she

had previously been sanctioned for those violations. In fact, she had been released from seven days in jail on her second sanction just 7 days before the state filed the motion to terminate. Thus, while a drug court sanction or termination hearing does not require the full panoply of due process rights inherent in a felony jury trial, it at least includes the right to notice of the violations alleged.

In this case the lack of written notice was exacerbated by the fact that no notice of the alleged violation or violations was given orally in court. Thus, the defendant was left to speculate as to why the state had filed the petition. What is clear from her statement is that she was denying any new willful violations of the drug court proceeding. In spite of her general denial of any willful violations the trial court summarily terminated her from the drug court program. It thereafter refused to even consider any communication from her, going to the point of ripping up her letter of explanation in front of her in open court while at the same time refusing to allow her to speak. Thus, the defendant was denied any sort of notice or opportunity to be heard. As a result, this court should vacate the termination order and remand for a new hearing following proper notice.

II. UNDER THE APPEARANCE OF FAIRNESS DOCTRINE THIS COURT SHOULD REMAND FOR A NEW HEARING ON THE DEFENDANT'S MOTION FOR RECONSIDERATION BEFORE A DIFFERENT JUDGE BECAUSE A REASONABLY PRUDENT, DISINTERESTED OBSERVER WOULD NOT CONCLUDE THAT THE DEFENDANT HAD OBTAINED A FAIR, IMPARTIAL AND NEUTRAL HEARING ON HER MOTION.

Under the Appearance of Fairness doctrine, a judicial proceeding is valid only if a "reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ladenburg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992); *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, 675 (1995). This rule derives in part from section 3(C)(1) of the Code of Judicial Conduct which provides in part that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned . . . ." Our courts analyze whether or not a trial judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all facts relevant to the case. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995). The party seeking disqualification has the burden of producing sufficient evidence demonstrating actual or potential bias; mere speculation is not enough. *In re Pers. Restraint of Haynes*, 100 Wn.App. 366, 996 P.2d 637 (2000).

Federal courts applying a similar test suggest consideration of the following three criteria when evaluating the need to remand a case before a

different judge. These criteria are:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United Nat'l Ins. Co. V. R & D Latex Corp., 242 F.3d 1102, 118-119 (9th Cir. 2001).

A careful review of the court's statements at the hearing on December 12, 2015, strongly supports the conclusion that each of these criteria has been met and that this court should remand for a new hearing in front of a different judge on the defendant's motion for reconsideration. The following reviews the court's statement given following the defendant's oral motion for reconsideration:

> MR. WHEELER: Your Honor, is the Court interested in hearing from Ms. Harper?
>
> THE COURT: No.
>
> Ms. Harper, here's the letter that you sent to me. I haven't read it. Don't write to me anymore. I'm not interested in hearing from you. You have zero credibility with me. Zero.
>
> If you guys want to continue it two weeks, that's fine. I have a pretty good idea of what's going to happen.

RP 12/15/15 9-10.

The court's statements standing alone would lead any reasonable

person to believe that the defendant was not going to get a fair hearing on her motion for reconsideration. However, the court's statement does not stand alone. Rather, while the verbatim report of the 12/15/15 hearing does not include a notation that the court took the defendant's letter and tore it up in front of her, this is precisely what happened. At the next hearing the judge admitted that he had taken this action. Specifically, the judge stated: "And I think what happened is, as I recall anyway, I remember you writing a letter to me that I tore up in front of you and told you not to write to me anymore." RP 12/29/15 15. It is true that the court made this admission during an apology to the defendant. However, apology or no, the court's grossly inappropriate conduct and statements at the prior hearing would lead any reasonable person to the conclusion that the defendant was not going to get a fair and impartial hearing on her motion. As a result, this court should vacate the trial court's decision denying the defendant's motion for reconsideration and remand for a new hearing on the motion in front of a different judge.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL-FINANCIAL OBLIGATIONS THE LEGISLATURE HAS NOT AUTHORIZED.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and

terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). One of the terms that a trial court may impose against a defendant is "costs" as authorized under RCW 10.01.160. The first section of this statute states:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

The second section of this statute includes language concerning the imposition of costs involved in certain treatment programs, as states:

> (2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision other than a pretrial electronic alcohol monitoring program, drug monitoring program, or 24/7 sobriety program may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant

> convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

RCW 10.01.160(2).

Under this statute the only costs a court may impose are those (1) "specially incurred by the state in prosecuting the defendant", (2) those costs "in administering the deferred prosecution program under chapter 10.05 RCW" and (3) costs of "pretrial supervision." The trial court's imposition of $30.00 a week "towards the costs of treatment" is not included in those costs authorized under RCW 10.01.160(2). Neither has counsel been able to find any other statute authorizing the imposition of this cost. As a result the trial court erred when it imposed this legal financial obligation.

IV. THIS COURT SHOULD NOT IMPOSE COSTS ON APPEAL IF THE STATE SUBSTANTIALLY PREVAILS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both the trial and appellate level. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and

time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis,* to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392.

Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

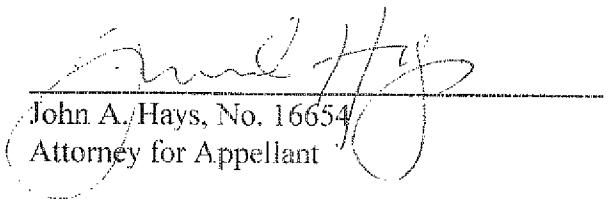
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. The defendant is a 32-year-old drug addict sentenced to 43 months in prison with a requirement that she successfully complete treatment following her release from prison and during her community custody. Given these factors, it is unrealistic to think the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail on appeal.

CONCLUSION

This court should vacate the trial court's order of termination from drug court and remand for a new hearing in front of a different judge. In the alternative, this court should vacate the $30.00 drug court fee the trial court included in the defendant's legal financial obligations. Finally, should the state prevail on appeal the court should refrain from the imposition of costs on appeal.

DATED this 3rd day of June, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE I, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 10.61.100

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision other than a pretrial electronic alcohol monitoring program, drug monitoring program, or 24/7 sobriety program may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs

will impose.

(4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **LINDA K. HARPER,** **Appellant.**	**NO. 48442-1-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Carol Laverne
   Thurston County Prosecutor's Office
   2000 Lakeridge Dr. S.W., Building 2
   Olympia, WA 98502
   lavernc@co.thurston.wa.us

2. Linda K. Harper, No.387952
   Washington Corrections Center
   9601 Bujacich Road NW
   Gig Harbor. WA 98332-8300

Dated this 3rd day of June, 2016, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

June 03, 2016 - 3:42 PM

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